



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 566 OF 2012

ZABLON KAMAU NYORO (Suing as

the legal representative of the

estate of JOHN NYORO NGIGI.....PLAINTIFF

VERSUS

LASON MAYODI OMBISA.....1ST DEFENDANT

NIXON KUSEKWA LUSENO.....2ND DEFENDANT

PETER MUNGAL.....3RD DEFENDANT

JUDGMENT

By a plaint dated 7th December 2009 and amended on 17th April 2018, the plaintiff herein sued the defendants jointly and severally seeking for the following orders.

- a) A declaration that John Nyoro Ngigi (deceased) is the lawful and absolute owner of land title No. KAKAMEGA/SERGOIT/965.
- b) A declaration that the continued registration of the caution by the 1st defendant against parcel No. KAKAMEGA/SERGOIT/965. Is unlawful.
- c) An order directing the Land Registrar Kakamega County to lift the caution lodged by the 1st defendant against the suit land.
- d) A permanent injunction to restrain the defendants, their agents or servants from trespassing, disposing of or in any way dealing with the parcel of land known as KAKAMEGA/SERGOIT/965.
- e) Damages for wrongful placement of caution against the parcel of land No. KAKAMEGA/SERGOIT/965.
- f) Costs and interest.

PLAINTIFF'S CASE

PW1 stated that his father, the deceased was the registered owner of the suit land and produced a certificate of search confirming the same. He also produced a certificate of confirmation of grant confirming that he was appointed an administrator of the estate.

It was PW1's evidence that the beneficiaries of the estate decided to sell the suit land and appointed the 2nd defendant to conduct a survey and carry out subdivision on the property. That the 2nd defendant misrepresented himself as the owner of the suit land and in collusion with the other defendants proceeded to fraudulently dispose of 0.8HA of the land to the 3rd defendant and 4 acres to the 1st defendant.

PW1 further testified that the 1st defendant placed a caution over the suit land making it impossible for the plaintiff to discharge his duties as administrator. He also testified that the County Land Registrar of Kakamega refused to remove the caution and stated that only a court order would allow removal of the same. He produced letters from the Land Registrar as proof of the same. PW1 stated that no reasons have been given by the 1st defendant as to why the caution was placed on the suit land which curtailed the distribution of the suit land.

PW1 produced a search certificate and copy of the title that bore the names of the deceased as the registered owner of the suit property. It was his evidence that he attempted to evict the defendants with the help of the area chief but they ignored summons issued by the chief. That the defendants proceeded to erect structures on the land without the plaintiff's permission therefore necessitating the filing of this suit.

PW1 closed his case and urged the court to grant the prayers as per the plaint with costs.

1ST AND 2ND DEFENDANT'S CASE

The 1st and 2nd defendants filed a defence but never participated during the hearing of the case.

3RD DEFENDANT'S CASE

DW2 stated that on 17th April 2008 vide an agreement he represented Hudson Odemo who is his cousin to purchase 0.8HA curved from the suit land for Kshs. 530,000/- whereby he paid Kshs.400,000/- on execution of the agreement in the presence of the 1st and 2nd defendants. He stated that Odemo gave him Kshs. 55,000/ which he paid to the 1st defendant but later realized that the owner of the land had not received the whole amount for 4 acres while the 1st defendant insisted that he had paid the amount for 8 acres. It was his testimony that this prompted him and Odemo to withhold payment of the balance.

He further stated that the owner of the suit land disowned him and claimed that he only knew the 1st defendant who had given him Kshs. 600,000/- for which he was ready to curve out 2.4 acres of the suit land.

DW2 stated that he later sold Hudson Odemo's portion which prompted him to report the matter to the police and the 3rd defendant was arrested. He was later released after the complaint was withdrawn. It was his evidence that the defendants sat in the presence of the chief with Hudson Odemo and the 1st defendant relinquished 1.7 acres worth 455,000/- to Odemo who started developments on the suit land.

DW2 stated that he has been using the land since 2009 to date and that before the purchase he undertook due diligence by ascertaining that the defendants were authorised by the plaintiff to sell the suit land. It was his evidence that he followed due process and bought the land in good faith. He therefore urged the court to dismiss the plaintiff's case with costs.

Plaintiff's Submissions.

Counsel for the plaintiff filed submissions and listed issues for determination as follows:

- a) Whether the court ought to issue an order declaring John Nyoro Ngigi as the absolute owner of the suit land.
- b) Whether the plaintiff is entitled to the relief of a permanent injunction restraining the defendants from dealing with the suit property
- c) Whether the court should direct the Land Registrar to lift the caution placed on the suit land
- d) Whether the plaintiff is deserving of the order for damages for wrongful placement of caution
- e) Who should pay costs of this suit?

On the first issue Counsel submitted that the plaintiff confirmed that his late father was the registered owner of the suit land and that he produced a copy of the title and official search. Counsel cited Section 24 of the Land Registration Act and Section 26(1) of the Land Act on absolute ownership and the indefeasibility of title.

Counsel relied on the case of Francis Shirima Okwaro v Patrick Okoth Echesa & Another (2019) eKLR where the court explained the issue of proof of ownership in the following words:

“ the law is clear that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge...”

Counsel also submitted that by virtue of being the registered owner the deceased is deemed to be an absolute and indefeasible owner of the suit land.

On the second issue as to whether the plaintiff is entitled to orders of injunction Counsel relied on the *Giella v Cassman Brown* case and submitted that the plaintiff has established that he is entitled to grant of an injunction to stop the defendants from interfering with the suit land. That the 3rd defendant admitted that he was never involved in the purchase of 0.8HA of the property and the purchase price was not paid to the plaintiff herein. It is evident that the plaintiff's rights have been infringed by the actions of the defendants and therefore there is a prima facie case.

On the issue whether the land Registrar should be directed to remove the caution lodged on the suit land by the 1st defendant, Counsel submitted that the 1st defendant maliciously placed a caution on the suit land and relied on he relied on Section 73 of the Land Registration Act which provides that a caution may be removed by an order of the court , by the Registrar or by the cautioner.

Counsel also cited the case of **Joseph Kibowen Chemjor v William C Kisera (2013) eKLR** where the court held that cautions may be removed by an order of the court or by the Registrar or withdrawn by the cautioner. The 1st defendant has no rights over the suit land that required placement of a caution.

On the issue as to whether the plaintiff ought to be compensated for the placement of wrongful and unlawful caution Counsel submitted that the Land Registration Act provides that:

“Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

It was Counsel’s submission that the plaintiff is an administrator of the estate of the deceased but due to the fraudulent actions of the defendants he has not been able to administer the estate since the death of the deceased 8 years ago. The actions by the defendants have occasioned the plaintiff and the beneficiaries’ great harm.

Counsel therefore urged the court to allow the plaintiff’s claim with costs.

3rd Defendant’s Submissions

Counsel submitted that the 3rd defendant was not aware of any defect therein making him a bonafide purchaser for value and relied on the case of **Katende v Haridar & Company Limited (2008) 2 E.A 173** on being a bonafide purchaser for value. He further relied on the case of **David Ngugi Ngari v Kenya Commercial Bank Ltd (2015) eKLR** to buttress his submission that the plaintiff’s conduct of lying to the court disentitled him to the equitable remedies he sought.

Counsel therefore urged the court to dismiss the plaintiff’s claim with costs to the 3rd defendant.

Analysis and Determination

The issues for determination in this case are as follows:

- a) Whether the plaintiff’s late father is the registered owner of the suit land
- b) Whether the 2nd defendant misrepresented himself as the owner of the suit land
- c) Whether the 3rd defendant is a bonafide purchaser for value for the 0.8HA he purchased
- d) Whether the continued registration of the caution is unlawful
- e) Whether the injunction should issue
- f) Whether the plaintiff is entitled to damages

On the first issue as to whether the plaintiff’s late father is the registered owner of the suit land, from the copy of title and official search produced it is evident that the land was registered in the name of John Nyoro Ngigi (deceased)

Section 26 of the Land Registration Act provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In **Munyu Maina.Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances

including any and all interests which would not be noted in the register.”

The defendants did not produce any evidence to controvert the evidence of ownership by the plaintiff and therefore on a balance of probabilities I find that the deceased was the registered owner of the suit land.

On the second issue whether the 2nd defendant misrepresented himself as the owner of the suit land, from the evidence it is clear that 1st defendant purchased 4 acres of the suit land from the 2nd defendant. In his replying affidavit filed on 14th December 2009 the 1st defendant annexed an agency form dated 16th April 2008 executed by the deceased and witnessed by the administrator and other witnesses. However, a copy of the grant of letters of administration indicates that the deceased died on 2nd March 2001. In effect the deceased could not have authorised an agreement in 2008 as he was long dead. It is clear therefore that the 2nd defendant misrepresented himself as the agent of the owners of the suit land.

On the issue as to whether the 2nd and 3rd defendants were bona fide purchasers, the threshold for one to be considered a bonafide purchaser were set down in **Katende v. Haridar & Company Limited (2008) 2 E.A.173**,

It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice: -

“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;*
- b. he purchased the property in good faith;*
- c. he had no knowledge of the fraud;*
- d. he purchased for valuable consideration;*
- e. the vendors had apparent valid title;*
- f. he purchased without notice of any fraud;*
- g. he was not party to any fraud.*

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

The 1st defendant did not hold any certificate of title. The 3rd defendant has not produced any certificate of title of the suit land. He claims to have undertaken due diligence in ascertaining that the defendants had been authorized to sell the suit land but did not explain or prove what this due diligence entailed. He did not produce a certificate of search or any other proof that he had conducted due diligence.

The letter of authority filed as LMO1 and annexed to the replying affidavit of the 1st defendant filed on 14th December 2009 is fraudulent as the deceased had died on 2nd March 2001 (as per the certificate of confirmation of grant) and the authority was purportedly given by him in 2008. The 3rd defendant has not alluded to relying on this letter as proof that the 2nd defendant was authorised to sell the land. The defendants have also not indicated what they relied on as proof of apparent title of the vendor. The fact that they have failed to satisfy at least 2 of the requirements set out in **Katende v Haridar** is enough to conclude that they were not bonafide purchasers for value.

In the premises, the defendants were not bonafide purchasers for value.

On the issue as to whether the placement of the caution of the suit land was unlawful and therefore should be removed, see the case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR** where it was stated that;

“The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest.”

It is therefore paramount that the cautioner must have an interest in the suit property that he is protecting and/or be apprehensive that such interest may be obliterated. The cautioner in this instance has no such interest thus the same should be removed.

Section 73 of the Land Registration Act provides;

(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

In **Joseph Kibowen Chemjor v William C Kisera [2013] eKLR** the court held;

Thus cautions may be removed in three ways.

- (a) By withdrawal of the same by the cautioner.
- (b) By removal by order of the court.
- (c) By removal by order of the Registrar.

These three ways are independent of each other such that it is not necessary for one to demonstrate that he has attempted to have the caution removed by the Land Registrar before moving the court to remove the caution. It is however always advisable to have the court arbitrate the matter as a last recourse.

The plaintiff demonstrated that he had approached the Land Registrar evidenced by the letters written. I find that the caution serves no purpose and hence should be removed.

Further in the case of **Jane Wanjiru Kuria Vs James Maina Mwangi & 3 Others (2015) eKLR** the court stated that under section 73(1) the Land Registration Act No. 3 of 2012 gives the court powers to make and order to remove a caution.

On the issue of an injunction against the defendants, the plaintiff has shown that the land was sold as a result of fraudulent misrepresentation by the 2nd defendant. The plaintiff is therefore entitled to grant of an injunction against the defendants.

Finally, on the issue as to whether the plaintiff is entitled to damages for wrongful placement of the caution, Section 75 of the Land Registration Act provides;

Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.

The 2nd defendant has not provided any reasonable cause for the caution to be maintained therefore the same was wrongful. He is therefore liable to pay damages to the plaintiff. Damages are granted when a person is injured or suffers loss that stems from the wrongful actions of another party. I find that the plaintiff has demonstrated that that the 1st defendant wrongfully maintained a caution for over 8 years without any justification. He occasioned loss to the plaintiff and the beneficiaries of the estate of the deceased. They were not able to administer the estate as planned. I hereby assess the damages at Kshs 200,000/. I therefore make the following orders.

- a) A declaration is hereby issued that John Nyoro Ngigi (deceased) is the lawful and absolute owner of land title No. KAKAMEGA/SERGOIT/965.
- b) A declaration is hereby issued that the continued registration of the caution by the 1st defendant against parcel No. KAKAMEGA/SERGOIT/965 is unlawful.
- c) An order is hereby issued directing the Land Registrar Kakamega County to lift the caution lodged by the 1st defendant against the suit land.
- d) A permanent injunction is hereby issued restraining the defendants, their agents or servants from trespassing, disposing of or in any way dealing with the parcel of land known as KAKAMEGA/SERGOIT/965.
- e) The 1st defendant to pay Kshs. 200,000/ being damages for wrongful placement of caution against the parcel of land No. KAKAMEGA/SERGOIT/965
- f) Costs and interest.

DATED and DELIVERED at ELDORET this 19TH DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kiboi holding brief for Mr.Kamau for Plaintiff and in the absence of Mr.Kagunza for 3rd Defendant and in the absence of 1st and 2nd Defendant.

Mr. Mwelem – Court Assistant